BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
WILLARD D. AND ESTHER J. SCHOELLERMAN)

Appearances:

For Appellants: Willard D. Schoellerman, in pro. per.

For Respondent: Marvin J. Halpern
Counsel

O P I N I O N

This appeal is made pursuant to section 19594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Willard D. and Esther J. Schoellerman against a proposed assessment of additional personal income tax and penalty in the total amount of $255.20 for the year 1967.

Appellants are deeply involved with the Calvary Bible Church and its activities. Mr. Schoellerman, in addition to his employment on the management staff of a

development firm, serves as chairman of the board of directors and is a deacon of the church. Mr. Schoellerman *is* also chairman of the board of the Forest Lake Christian School, Inc., a California nonprofit corporation. Mrs. Schoellerman has served as a director of the school and has taught there for several years without receiving any salary or other remuneration. It is unquestioned that appellants' commitment to their church is total and complete. Mr.. Schoellerman indicated that one of the tenets of his church was tithing when possible. For several years prior to 1967 appellants' contributions to their church were minimal. However, in order to make up for this appellants, in 1967, contributed $12,887.50, or 42 percent of their adjusted gross income, to the Calvary Bible Church.

In 1969 the Internal Revenue Service audited appellants' 1967 and 1968 income tax returns. As a result of the. audit appellants' 1967 taxable income was increased by over $4,800.00, the amount by which their charitable contributions exceeded 30 percent of their adjusted gross income. In view of the fact that the federal law allows a five-year carryover of charitable contributions that exceed 30 percent of adjusted gross income, the net federal tax change for 1967 and 1968 was minimal and appellants did not contest the federal adjustment. After obtaining a copy of the Internal Revenue Service's adjustments respondent adopted the federal changes increasing appellants' 1967 taxable income and assessed a 5 percent penalty for negligence. Since the California Personal Income Tax Law does not provide for a carryover of excess contributions the net tax change was more substantial. Therefore, appellants protested this adjustment. Their protest was denied and this appeal followed.

Respondent has conceded the impropriety of imposing the 5 percent negligence penalty and has agreed to adjust the deficiency assessment accordingly. Therefore, the sole issue for determination is the propriety of respondent's reliance on the federal audit adjustment made by the Internal Revenue Service.

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Section 18451 of the Revenue and Taxation Code provides, in part, that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. It is well settled that a determination by the Franchise Tax Board based upon a federal audit is presumed to be correct and the burden is on the taxpayer to overcome that presumption. (Todd v. McColgan, 89 Cal. App. 2d 509 [201 P.2d 414]; Appeal of Joseph B. and Cora Morris, Cal. St. Bd. of Equal., Dec. 13, 1971; Appeal of Hyman and Mabel K. Krieger, Cal. St. Bd. of Equal., Oct. 27, 1971.)

Here, appellants have not only failed to overcome the presumption but also have admitted the accuracy of the federal determination. Nevertheless, appellants contend that respondent's disallowance of that part of their 1967 religious contributions in excess of 30 percent of adjusted gross income&/ is a violation of their right to the free exercise of their religion and deprives them of the equal protection of the laws guaranteed by the First and Fourteenth Amendments to the United States Constitution. We do not agree. It does not appear that this precise question has been decided by either the California or federal courts. However, in an analogous matter involving the free exercise of religion the United States Supreme Court suggested that there is no constitutional infirmity in such practice. (Braunfeld v. Brown., 366 U.S.' 599, 606 [6 L. Ed. 2d 563] (dictum); but cf.

1/ As respondent noted in its brief, sections 17214 and 17215 of the Revenue and Taxation Code, which were patterned after section 170 of the Internal Revenue Code of 1954, provide that religious contributions in excess of 20 percent of adjusted gross income are not deductible. Respondent erred in using the 33 percent maximum of Internal Revenue Code section 170, rather than the 20 percent maximum of Revenue and Taxation Code sections 17214 and 17215.

Sherbert v. Verner, 374 U.S. 398 [10 L. Ed. 2d 9651.) In making that suggestion the court stated:

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church. ... (Braunfeld v. Brown, supra at 606.)

In any event it is a well-established policy of this board not to rule on a constitutional question raised in a deficiency assessment appeal. This policy is based upon the absence of any specific statutory authority which would allow the Franchise Tax Board to obtain judicial review of an unfavorable decision. (Appeal of Maryland Cup Corp., Cal. St. Bd. of Equal., March 23, 1970; Appeal of Paul Peringer, Cal. St. Bd. of Equal., Dec. 12, 1972.)

In conclusion it is apparent that appellants have failed to point out any errors in the federal audit, and have not established that respondent's proposed assessment is erroneous. Therefore, appellants have failed to carry their burden and respondent's determination of additional tax must be upheld.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

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IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Willard D. and Esther J. Schoellerman against a proposed assessment of additional personal income tax and penalty in the total amount of $255.20 for the year 1367, be and the same is hereby modified in accordance with respondent's concession. In all other respects the action of the Franchise Tax Board is sustained.

Done at Sacramento, California, this 17th day of September, 1973, by the State Board of Equalization.

_____, Chairman

_____, Member

_____, Member

_____, Member

_____, Member

ATTEST: _____, Secretary